No. 95-1515

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOSEPH GERASOLO, ELIZABETH GERASOLO and PATRICK BLEACH,

Petitioners,

vs.

THE ADHERENCE GROUP, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the District Court's decision to abstain in entertaining a second stage proceeding under the interpleader statute (28 U.S.C. § 1335 (1993)), having completed the first stage of the interpleader proceeding, in deference to a pending parallel state court proceeding is governed by the discretionary standard enunciated in *Brillhart*[1] or the "exceptional circumstances" standard set forth in *Colorado River.*[2]

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1. *Brillhart v. Excess Insurance Company of America*, 316 U.S. 491 (1942).

2. *Colorado River Water Con. Dist. v. United States*, 424 U.S. 800 (1974).

LIST OF INTERESTED PARTIES

The Respondent is correctly identified in the caption. Pursuant to United States Supreme Court Rule 29(6), The Adherence Group, Inc.'s corporate stock is wholly owned by TAG/ICIB Services, A.G., a foreign corporation chartered and located in Zurich, Switzerland. Neither The Adherence Group, Inc. nor TAG/ICIB Services, A.G. possess non-whollyowned subsidiaries.

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APPENDIX

Appendix A — Order of the United States District Court for the District of New Jersey Filed May 19, 1994	1a

Respondent's request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Third Circuit,[3] *Petition for Cert. filed*, 64 U.S.L.W. 368 (April 12, 1996) (No. 95-1515).

STATEMENT OF THE CASE

This case deals with a Verified Complaint filed in Interpleader by a disinterested stakeholder, NY Life Distributors, Inc. ("NY Life") which judgment in Interpleader was granted on May 19, 1994 by the United States District Court for the District of New Jersey.

Substantial assets of The Adherence Group, Inc. ("TAG") were placed by Petitioners Joseph Gerasolo, ("Gerasolo") and Patrick Bleach ("Bleach") into a non-qualified executive compensation plan opened with Mainstay, Inc. through NY Life.

Gerasolo as President of TAG and Bleach as Vice-President of TAG authorized that TAG's assets should be placed in the Mainstay Mutual Accounts as additional compensation without seeking the approval of the Board of Directors of TAG or authority of TAG's sole shareholders, its Swiss parent company, TAG/ICIB Services, A.G. ("TAG/ICIB").

In October of 1993, Gerasolo's employment with TAG was terminated. Shortly thereafter, Bleach resigned.

After Gerasolo and Bleach's employment with TAG ended, an internal audit of TAG's books and records were conducted by TAG and TAG/ICIB which revealed that Gerasolo and Bleach

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3. The Court of Appeals' opinion is unreported and reproduced in the Appendix of the Petition (Pet. App. 1a - 27a). All citations to the opinion will be to the opinion attached to the petition.

had implemented a compensation plan and had placed TAG's assets in the Mainstay Mutual Account without the knowledge of TAG, TAG's Chairman of the Board, nor its sole shareholder, TAG/ICIB. The audit also revealed other instances of the assets of TAG being embezzled and converted to the benefit of Gerasolo and Bleach.

TAG took steps to protect the monies held in the Mainstay Mutual Accounts and requested of NY Life that the accounts of Gerasolo and Bleach be frozen.

NY Life being a disinterested stakeholder and fearing competing claims to one fund, invoked the protection of the Federal Interpleader Act, 28 U.S.C. § 1335 (1993).

The settlement agreements (Pet. App. 3a-4a) were between Gerasolo, Bleach, and TAG/ICIB, not TAG, as all compensation to Gerasolo and Bleach was governed by an employment contract with TAG/ICIB.

On March 23, 1994, TAG and TAG/ICIB commenced an action in the Superior Court of New Jersey, Middlesex County, against Gerasolo, Elizabeth Gerasolo and Bleach, for the wrongful conversion and embezzlement of TAG's assets, through fraud, to their benefit, including the monies held in the Mainstay Mutual Fund. The Complaint also requests judgment for all of TAG's funds which were converted and then placed in the 1989 Mainstay Mutual Fund accounts opened jointly by Gerasolo and Elizabeth Gerasolo.

The Complaint includes a malpractice Count against the Moore Stephens Accounting Firm and was later amended to include a Count against the law firm of Connell, Losquadro & Zerbo and unknown John Doe(s).

A. Course of Proceeding and Disposition of the Case Below.

NY Life filed its Verified Complaint in Interpleader on February 15, 1994 in the United States District Court for the District of New Jersey. On February 16, 1994, an Order was signed requesting the defendants to show cause "why the plaintiff should not have judgment in interpleader requiring the defendants to interplead and settle between themselves their rights" to the Mainstay Mutual Funds.

The Petitioners Gerasolo, Elizabeth Gerasolo and Bleach answered the Interpleader Complaint and counterclaimed against NY Life. Gerasolo and Bleach filed a Cross-Motion seeking dismissal of NY Life's Interpleader action, reinvestment of the funds redeemed by NY Life, denial of NY Life's application for an Order enjoining all claims against it for damages sustained by Gerasolo and Bleach due to the liquidation, denial of NY Life's request for attorneys' fees and award of attorneys' fees and costs incurred by Gerasolo and Bleach in the Interpleader action from TAG pursuant to their severance agreements.

TAG filed an Answer to the Interpleader Complaint and a Brief in support of NY Life's Interpleader claim, in opposition to NY Life's claim for counsel fees and in opposition to Gerasolo and Bleach's request that TAG pay attorney fees in connection with the Interpleader action.

TAG, prior to Judgment in Interpleader, filed a Complaint in the Superior Court of New Jersey, Middlesex County, against Gerasolo, Elizabeth Gerasolo and Bleach, for the conversion of TAG's assets in excess of One Million Dollars ($1,000,000) including TAG's assets diverted into the Mainstay Mutual Funds which were the subject of NY Life's Verified Complaint in Interpleader. TAG obtained proper service of process and jurisdiction over all defendants.

The District Court, by Order dated May 19, 1994, granted plaintiffs' Motion in Interpleader (Resp. App., *infra* at 10a) and did not enjoin TAG "from pursuing its state law claims against the Gerasolo defendants." (Resp. App. 9a).

The District Court additionally dismissed NY Life from the action and future liability for the payment of said deposits into the Court Registry (Resp. App. 10a), ordered that all defendants to the Interpleader action be enjoined from instituting any other actions against NY Life or its affiliates based upon the Interpleader action (Resp. App. 10a), awarded NY Life attorneys' fees and costs (Resp. App. 10a), denied defendants Gerasolo, Elizabeth Gerasolo and Bleach's Cross-Motion (Resp. App. 10a), and dismissed Gerasolo, Elizabeth Gerasolo and Bleach's Counterclaims (Resp. App. 10a).

On June 14, 1994, after a Judgment in Interpleader was granted to NY Life and after TAG and TAG/ICIB filed the state court action. Gerasolo, Elizabeth Gerasolo and Bleach filed an Amended Answer to the Interpleader Complaint inserting a Crossclaim against TAG for attorney fees in connection with the Interpleader action, judgment against TAG for violation of the New Jersey Conscientious Employer Protection Act, N.J.S.A. 34:19-1, *et seq*. and malicious abuse of process in asserting a claim to Gerasolo and Elizabeth Gerasolo's 1989 Mainstay Mutual Account.

On July 8, 1994, TAG filed a Notice of Motion to Dismiss defendants Gerasolo and Bleach's crossclaims and transfer the Interpleader funds to the Superior Court of New Jersey or, in the alternative, retain jurisdiction over the Interpled funds while TAG pursued its state claims in state court.

On October 26, 1994, the District Court granted TAG's Motion to Dismiss the defendants Gerasolo and Bleach's

Crossclaims and ordered that the District Court retain jurisdiction over the Interpled funds pending the outcome of the state court litigation between the claimants at which time the prevailing party may apply to the court for an appropriate distribution of the funds (Pet. App. 31a). The District Court held that "all Federal claims had been dismissed and declined to exercise supplemental jurisdiction over the remaining State Law cost claims," pursuant to 28 U.S.C. § 1367(c) (Pet. App. 29a).

The Petitioners Gerasolos and Bleach filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit.

Argument before the United States Court of Appeals for the Third Circuit took place on August 1, 1995.

On October 30, 1995, the matter was relisted on the merits for Wednesday, November 29, 1995. Notice was also sent that the panel wished to discuss the applicability, if any, of *Wilton v. Seven Falls Company*.[4] On November 29, 1995, the matter was argued on the merits before a reconstituted panel of United States Court of Appeals for the Third Circuit.[5]

The Court of Appeals held "that a motion to dismiss a Federal Statutory Interpleader action during the pendency of a parallel State Court proceeding is addressed to the sound discretion of the District Court." (Pet. App. 3a).

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4. __ U.S. __, 115 S. Ct. 2137 (1995). There is no indication that the Court of Appeals' request for relisting on the merits was in light of *Wilton* but more appropriately, as a consequence of the death of the Honorable William D. Hutchinson, an original member of the Panel.

5. The Honorable Anthony J. Scirica joined the new panel.

The Court of Appeals rejected the District Court's assessment that once the first step of interpleader was completed on May 19, 1994, granting NY Life's Motion for Judgment in Interpleader and dismissing NY Life, that all federal claims had been dismissed, and accordingly, the District Court did not have discretion under 28 U.S.C. § 1367(c)(3) (1993) to dismiss all state law claims (Pet. App. 9a).

The Court of Appeals held that the "exceptional circumstances" test enunciated in *Colorado River* [6] was not universal and inapplicable based upon the Supreme Court's decisions in *Brillhart*[7] *Will*[8] and *Wilton*[9] to statutes vesting the District Courts with greater discretion (Pet. App. 17a). Interpleader is a suit in equity, and by its equitable nature, jurisdiction is conferred on the federal process within broad discretion (Pet. App. 17a-18a). There exists nothing in the language of the federal interpleader statute, 28 U.S.C. § 1335 (1993), nor in its legislative history that indicates Congress intended to alter traditional equity practice (Pet. App. 18a) or make the interpleader remedy obligatory (Pet. App. 22a).

The concurring opinion by Justice Roth would have applied the more narrow *Colorado River* test in this matter (Pet. App. 27a) as no statutory indication exists that the second stage of an interpleader proceeding is discretionary (Pet. App. 25a).

The case was remanded to the District Court for further

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6. *Colorado River Water Cons. Dist. v. United States.*, 424 U.S. 800 (1974).

7. *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942).

8. *Will v. Calvert Five Ins. Co.*, 437 U.S. 655 (1978).

9. *Wilton v. Seven Falls Co.*, __ U.S. __, 115 S. Ct. 2137 (1995).

proceedings on TAG's July 8, 1994 motion in light of the discretionary standard set forth in the Court of Appeals' Opinion.

All parties filed Petitions for Rehearing *in banc*. The petitions were denied.

REASONS FOR DENYING THE WRIT

I.

INTERPLEADER JURISDICTION UNDER THE FEDERAL INTERPLEADER STATUTE, HAS ALWAYS BEEN DISCRETIONARY.

Interpleader has, since its inception, been an equitable remedy.[10] The purpose of the federal interpleader statute, 28 U.S.C. § 1335, was to give the stakeholder protection and in no way changed the rights of the claimants or the equitable principles and procedures which govern throughout federal jurisdiction.[11]

The federal interpleader statute was enacted in response to the Supreme Court ruling in *New York Life Insurance Company v. Dunley*.[12] In *Dunley*, two different courts required the payment of the same life insurance policy, and the stakeholder could not join both claimants in one state court action. Due to the limitations of state service of process and the fact that adverse claimants to a single fund often reside in different states, state

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10. *Texas v. Florida*, 306 U.S. 398 (1939); *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1933).

11. *Sanders*, 292 U.S. at 200.

12. 241 U.S. 518 (1916).

courts were incapable of providing full relief for a stakeholder faced with inconsistent claims.[13] Interpleader jurisdiction has always been considered discretionary, and interpleader should not be granted by equity if an adequate remedy exists at law.[14]

II.

THE OPINION OF THE THIRD CIRCUIT DOES NOT DIRECTLY CONFLICT WITH THE OPINION OF THE FIFTH CIRCUIT AND IS IN ACCORD WITH OTHER UNITED STATES COURTS OF APPEALS' DECISIONS.

The federal courts have consistently followed the view that the Interpleader statute does not compel the exercise of jurisdiction, depriving the courts of discretion traditionally exercised to deny equitable relief when there is an adequate remedy at law.[15] If a parallel state court action is pending wherein

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13. *See generally,* S. Rep. No. 660, 64th Cong., 1st Sess. 1 (1916).

14. *See Killin v. Ebbinghouse*, 110 U.S. 568,573 (1883) that "whenever a Court of Law is competent to take cognizance of a right and has power to proceed to judgment, which affords a plain adequate, and complete remedy without the aid of a Court of Equity, the plaintiff must proceed at law because the defendant has a constitutional right to a trial by jury. *See* Chafee, *Modernizing Interpleader,* 30 Yale L.J. 814, 821 (1921).

15. *American Airlines, Inc. v. Block*, 905 F.2d 12 (2nd Cir. 1990); *Equitable Life Assur. Soc. v. Porter-Engelhardt*, 867 F.2d 79 (1st Cir. 1989); *Home Indemnity Co. v. Moore*, 499 F.2d 1202 (8th Cir. 1974); *Koehring Co. v. Hyde Construction Co.*, 424 F.2d 1200 (7th Cir. 1970), overruling *Railway Express Agency v. Jones*, 106 F.2d 341 (7th Cir. 1939); *Humble Oil & Refining Co. v. Copeland*, 398 F.2d 364 (4th Cir. 1968); *Hickok v. Gulf Oil Corp.*, 265 F.2d 798 (6th Cir. 1959); *B.J. Van Ingem & Co. v. Connolly*, 225 F.2d 740 (3d Cir. 1955).

the liability of the stakeholder to all claimants can be determined, then the fear of multiple, vexatious and inconsistent liability is absent, and the need for the interpleader remedy is absent.[16]

A thorough review of the United States Court of Appeals for the Fifth Circuit's Decision from *Maryland Casualty Co. v. Glassell-Taylor and Robinson*, 156 F.2d 519 (5th Cir. 1946) to *Boston Old Colony Insurance Co. v. Baldin*, 591 F.2d 1040 (5th Cir. 1979) reveals an agreement with the United States Court of Appeals for the Third Circuit's opinion that district courts have discretionary power to stay proceedings in equity in deference to a parallel state court action.

Maryland Casualty Co., supra, at 524 recognized that the pendency of an action in state court is not a bar to the proceeding in federal court having jurisdiction. The Fifth Circuit Court of Appeals relied on the case of *Meredith v. Winter Haven*, 320 U.S. 228 (1942) which held that once diversity's jurisdiction was invoked, then, "[i]n the absence of some recognized public policy or defined principle guiding the existence of the jurisdiction conferred, which would in exceptional cases, warrant its non-exercise . . ." the federal courts have a duty to decide questions of state law.

In *Fulton v. Kaiser Steel Corp.*, 397 F.2d 580, 583 (5th Cir. 1968), the United States Court of Appeals for the Fifth Circuit stated that "[i]nterpleader generally is a suit in equity which invokes equitable principles."

Next, in the case of *P.P.G. Industries v. Continental Oil Co.*, 478 F.2d 674-79 (5th Cir. 1970) the United States Court of

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16. *See* 3A Moore, *Federal Practice*, ¶22.16[1] at 3138 (2d Ed. 1967); 7 Wright, Miller & Kane, *Federal Practice & Procedure*, § 1709, at 534 (2d Ed. 1986).

Appeals for the Fifth Circuit recognized that cases decided after *Brillhart* and *Meredith* have

> manifest a policy against dual litigation which applies with equal force to declaratory judgment actions and to ordinary equity suits, though not included in *Meredith's* list of exceptional circumstances, have given rise to a discretionary power in the Federal Courts to stay proceedings in equity suits in deference to a parallel State Court action.

Boston Old Colony Insurance Co. v. Baldin, 591 F.2d 1040 (5th Cir. 1979) is distinguishable from the present action and other suits wherein interpleader jurisdiction was denied in deference to a parallel state court action. First and foremost, the stakeholder was not disinterested. *Id.* at 1040. The Court of Appeals noted that the claimants were citizens of the same states, and the stakeholder not. Accordingly, jurisdiction of the court was founded upon the general diversity statute, 28 U.S.C. § 1332. *Id.* n. 5. Furthermore, the state court proceedings were inadequate to protect the stakeholder. *Id.* at 1045.

The Fifth Circuit Court of Appeals in *Boston Old Colony* held that "[o]nce jurisdiction is invoked, the general rule is that the District Court must proceed to decide the case . . ." *Id.* at 1043, relying upon *Meredith v. Winter Haven*, 320 U.S. 228, 236-37 (1943). *Meredith*, like *Boston Old Colony*, was an action whereby jurisdiction was premised under the general diversity statute, 28 U.S.C. § 1332, and not on minimal diversity in which the interpleader statute is premised, 28 U.S.C. § 1335(a)(1)(1993). The conferance of general diversity jurisdiction is to afford litigants an opportunity to assert their rights in federal, and not state court, and not to serve the convenience of the federal courts. *Meredith v. Winter Haven*, 320

U.S. 228, 234 (1943), 320 U.S. Accordingly, it was deemed a duty to exercise that jurisdiction once that jurisdiction was invoked. *Id.* Interpleader's minimal diversity was premised upon its equitable nature. In an ordinary case of partial co-citizenship, if federal jurisdiction is denied, the controversy can still be handled in state court. In Interpleader, jurisdiction over residents of different states is usually impossible in the state court, and accordingly, minimal diversity serves the purpose of the act that the federal court should settle all interpleader issues that cannot be handled by the state court.[17] Finally, in *Boston Old Colony Insurance Co.*, 591 F.2d at 1045, the stakeholder faced two lawsuits in the state court, and had difficulty joining all claimants in one action. The federal interpleader statute was enacted in response to just this situation.[18] Once all parties appear in the state court action in response to valid service of process, the necessity for the equitable federal remedy disappears.

It is clear that the United States Court of Appeals for the Fifth Circuit, in deciding *Boston Old Colony*, was applying the Supreme Court case law dealing with jurisdiction invoked under the general diversity statute and not the Supreme Court case law dealing with the district court's discretionary power to stay proceedings in equity suits in light of a parallel state court action in which all the parties appear.

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17. Chafee, *The Federal Interpleader Act of 1936*, 45 Yale Law Journal, 963, 974-975 (1936).

18. *See New York Life Ins. Co. v. Dunley*, 241 U.S. 518 (1916). *See* S. Rep. No. 660, 64th Cong. 1st Sess. 1 (1916).

III.

THE THIRD CIRCUIT OPINION VESTING THE DISTRICT COURTS WITH DISCRETION TO DISMISS SUITS BROUGHT UNDER THE FEDERAL INTERPLEADER STATUTE IN DEFERENCE TO A PARALLEL STATE COURT PROCEEDING IS A LOGICAL EXTENSION OF *WILTON V. SEVEN FALLS CO.* AND IN CONFORMANCE WITH SUPREME COURT DECISIONS FAVORING A POLICY AGAINST DUAL LITIGATION.

Courts of equity have always been vested with discretionary power.[19] In *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426,431 (1947), the Supreme Court stated "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." In *Abbott Laboratories v. Gardner*, 387 U.S. 136, the Supreme Court grouped together declaratory and injunctive relief and declared both remedies were discretionary.

The Supreme Court, in *Wilton*[20] held that the distinct features of the *Declaratory Judgment Act* "vested the District Court with greater discretion." The distinct features is that, since its inception, the *Declaratory Judgment Act* has been understood to confer substantial discretion, because of the statute's use of the word *may*, in 28 U.S.C. § 2201(a) (1988 ed., Supp. V.).

The federal interpleader statute, like the Declaratory Judgment Act, has always been known as an equitable remedy. The interpleader statute was adopted to provide a stakeholder

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19. *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943).

20. __ U.S. __, 115 S. Ct. 2137, 2142 (1995).

with relief when a state court proceeding was inadequate to join adverse claimants of different states. The reason for the grant of jurisdiction should determine its discretionary nature once invoked. Like declaratory judgment, and other equitable remedies, interpleader should not be granted when the parties have an adequate remedy at law in a parallel state court proceeding. Interpleader and declaratory judgment are remedies, and if the controversy can be adjudicated in a pending state court proceeding, federal declaratory relief is unwarranted[21] and so is interpleader relief.

The federal interpleader statute is to protect the disinterested stakeholder, and once this is complete, the statute does not provide the district courts with the ability to dismiss claimants' state court suits as long as the interpled funds are protected.[22]

Interpleader's purpose is to avoid piecemeal litigation, and by granting the district courts the discretion to dismiss an interpleader action in deference to a parallel state court proceeding, the legislative intent in invoking the federal interpleader statute, is served.

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21. *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942).

22. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

IV.

COLORADO RIVER SUPPORTS THE PRINCIPLE THAT PIECEMEAL LITIGATION SHOULD BE AVOIDED, AND DISTRICT COURTS CAN ABSTAIN FROM THE EXERCISE OF JURISDICTION FOR REASONS OF JUDICIAL ECONOMY.

The Supreme Court has continually held that "a court having jurisdiction must exercise it, is not universally true . . . courts of equity and law . . . occasionally [sic] decline, in the interest of justice, to exercise jurisdiction . . .".[23]

The pendency of a parallel state court suit has been sanctioned by the Supreme Court in *Eccles* as an "unusual circumstance which might warrant withholding of equitable relief."[24]

Justice Brennan, in delivering the Court's Opinion in *Colorado River Water Con. Dist. v. United States*, 424 U.S. 800, 817 (1976) specifically points out that this case falls within none of the traditional abstention categories, but notes that there are principles unrelated to the abstention categories which govern concurrent jurisdiction by state and federal courts that take into consideration wise judicial administration and a regard for federal-state relations. Justice Brennan uses the language

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23. *Canada Malting Co. v. Paterson Steamships Ltd.*, 285 U.S. 413, 422-423 (1932); *see also Langnes v. Green*, 282 U.S. 531 (1931); *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942); *Will v. Calvert*, 437 U.S. 655 (1978).

24. *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 434 (1947), the dissent by Justice Reed states that "unusual circumstances, not here present, such as other pending suits and then goes on to cite." *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491.

"virtually unflagging obligation of the Federal Courts to exercise jurisdiction given them", and quotes the following Supreme Court authority, *England v. Medical Examiners*[25] and *McClellan v. Carland.*[26] *Id.* Next, the majority sanctioned *Brillhart*,[27] noting that the desirability of avoiding piecemeal litigation is to be used in "assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction." *Id.* at 818. The District Court's dismissal was justified because the policy underlying the McCarren Amendment, 66 Stat. 560, 43 U.S.C. § 666, was to avoid piecemeal adjudication of water rights. *Id.* at 819.

Granting the district courts with discretion to stay an interpleader action in deference to a parallel state court action serves the legislator intent in enacting the interpleader statute and does not conflict with the Supreme Court's holding in *Colorado River.*

The federal court's duty to exercise jurisdiction is determined by the reasons for the grant of the jurisdiction found in the legislative history. Interpleader jurisdiction was conferred on the federal courts to avoid piecemeal, inconsistent and vexatious litigation when full relief could not be rendered in a state court proceeding. *Colorado River* also favors the avoidance of piecemeal litigation and the possibility of inconsistent results in multiple litigation and allows the district court to consider wise judicial administration, and take into account which action will completely dispose of the litigation.

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25. 375 U.S. 411 (1963), here jurisdiction was conferred based upon a federal constitutional claim.

26. *McClellan v. Carland*, 217 U.S. 268 (1910), jurisdiction was conferred upon general diversity.

27. *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942).

V.

THE EQUITABLE PRINCIPLES WHICH GOVERN THE DISTRICT COURT'S DISCRETION TO STAY A FEDERAL INTERPLEADER ACTION IN DEFERENCE TO A PENDING PARALLEL STATE COURT ACTION, APPLIES EQUALLY TO FIRST AND SECOND STAGE INTERPLEADER.

The federal interpleader action is a two-stage process. First, the stakeholder applies to the court for relief from double vexation, and in the second stage, the controversy is settled by the persons directly concerned.[28]

Interpleader can also protect the claimant by providing an equitable division of one fund.[29]

The district court possesses the same discretion to stay the second stage of a federal interpleader action in deference to a pending state court action.

Like first-stage interpleader, second-stage interpleader jurisdiction is only invoked for equitable reasons as in most instances, the substantive questions are legal. The interpleader forum should not be used to decide the controversy when a pending state court action will decide the controversy over the funds. A court of equity should not aid the court of law.[30]

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28. Chaffee, *Modernizing Interpleader*, 30 Yale L.J. 814, 816 (1921).

29. *State Farm Fire & Cas. Co. v. Tashir*, 386 U.S. 523 (1967). *See* 7 Wright, Miller & Kane, *Federal Practice & Procedure*, § 1703, at 496 (2d Ed. 1986).

30. *Killian v. Ebbinghouse*, 110 U.S. 568, 573 (1883).

Once the funds are interpled, the stakeholder receives vindication when claimants are enjoined from seeking to enforce against the interpled fund except in the interpleader proceeding.[31] Interpleader cannot be used to control claimant's lawsuit as long as the stakeholder is protected.[32] The stakeholder who has no interest in the controversy cannot control the rights of the interested parties to choose the forum to establish their claims.[33] Interpleader was not intended as a "bill of peace, in a multiple party action."[34]

The District Court should naturally have the discretion to stay the controversy over the interpled funds in deference to a pending state court action that will settle the rights to the interpled funds. Any other conclusion would fly in the face of the federal policy of avoiding dual, vexation and piecemeal litigation, which is the fulcrum of the interpleader statute.

Once the stakeholder receives vindication, the interpleader purpose has been served and there is no policy in the legislative history of the Federal Interpleader Act mandating jurisdiction of the claimant's controversy in the federal district court.

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31. *State Farm Fire & Cas. Co. v. Tashir*, 386 U.S. 523 (1967).

32. *Id.* at 535.

33. *Id.* at 536.

34. *Id.*

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MAY 19, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action
No. 94-637 (MTB)

NYLIFE DISTRIBUTORS INC.,

Plaintiff,

v.

THE ADHERENCE GROUP, INC., JOSEPH GERASOLO, ELIZABETH GERASOLO, PATRICK BLEACH, DENNIS SCNELL, DONALD THOMAS, RICHARD HESSEN, and JAMES LYONS,

Defendants.

ORDER

This matter having come before the court on plaintiff's order to show cause why a judgment in interpleader should not be entered pursuant to 28 U.S.C. § 1335, and upon the cross-motion of defendants Joseph Gerasolo, Elizabeth Gerasolo and Patrick Bleach (hereinafter "the Gerasolo defendants");[1] and the court

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1. The Gerasolo defendants have brought a cross-motion seeking (1) dismissal of NYLife's interpleader action against defendants Joseph Gerasolo, Elizabeth Gerasolo, and Patrick Bleach save for the purpose of determining damages sustained by the defendants as a result of NYLife's allegedly

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having considered the submissions of the parties without oral argument pursuant to Fed.R.Civ.P. 78; and

it appearing that NYLife alleges that it makes this application in response to conflicting demands over the funds that it has placed into the court's registry; [2] and

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unauthorized redemption and liquidation of the 1989 and 1991 Gerasolo accounts and the 1991 Bleach accounts; (2) immediate reinvestment of the cash derived by NYLife from its allegedly unauthorized redemption and liquidation of the 1989 and 1991 Gerasolo accounts and the 1991 Bleach accounts; (3) denial of NYLife's application for an order enjoining all claims against it for losses sustained by the defendants as a consequence of NYLife's liquidation and redemption; (4) denial of NYLife's demand for attorneys' fees and costs; and (5) an award of attorneys' fees and costs for expenses incurred in defense of the interpleader action from both NYLife and The Adherence Group. *See Memorandum of Defendants Joseph Gerasolo, Elizabeth Gerasolo and Patrick Bleach in Opposition to Interpleader and in Support of Cross-Motion* (hereinafter "Memorandum of Gerasolo Defendants"). Although the Gerasolo defendants characterize all of these requests as components of their cross-motion, some are more accurately described as arguments in opposition to plaintiff's order to show cause. In particular, defendants' request for an order denying the interpleader action, denying permanent injunctive relief, and for a date upon which NYLife is to show cause why it should not be held responsible for defendants' costs and attorney's fees will be treated as opposition to plaintiff's interpleader action.

2. NYLife Distributors Incorporated administers the Mainstay Mutual Fund. The Adherence Group, ("TAG"), of which defendants Joseph Gerasolo and Patrick Bleach were officers, maintained a nonqualified executive compensation plan on behalf of certain employees, including the individual defendants. In accordance with that plan, TAG purchased shares of the Mainstay Mutual Fund on behalf of the individual defendants. As of February 14, 1994, the individual defendants' total balance in the Mainstay Mutual Fund amounted to $215,489.50. *See Verified Complaint,* ¶ 12.

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it appearing that there are multiple parties who have made a claim to the proceeds ;[3] and it appearing that NYLife has

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On January 27, 1994, John Mullenholz, the attorney for TAG, sent NYLife a letter "request[ing] that no funds be disbursed from any of the accounts to which The Adherence Group funds were diverted until you receive further notification from The Adherence Group." Mullenholz reported that TAG's request was in response to "an internal audit from which it discovered that significant funds were diverted to Mainstay Mutual Funds . . . in excess of $150,000." Mullenholz further stated that although TAG "would normally be required to obtain a court order . . . the officers of The Adherence Group are in the Far East and consequently, we cannot obtain a court order until their return." Mullenholz attached a list of the defendants' accounts with Mainstay which it desired to be frozen.

On the strength of this letter, NYLife proceeded to redeem and liquidate the accounts cited by Mullenholz by selling the stocks and bonds in the securities funds and emptying cash from the money market funds. Plaintiff then deposited a total of $215,489.50 in the Registry of the United States District Court for the District of New Jersey on February 16, 1994 and filed the instant motion. Insofar as plaintiff seeks judgment in interpleader, TAG does not oppose the application.

3. Title 28, section 1335 of the U.S. Code provides as follows:

§ 1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of

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demonstrated a real and reasonable concern as a result of

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> such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if
>
> (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if
>
> (2) the plaintiff has deposited such money or property, or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

A stakeholder may bring an action in interpleader when it fears that multiple claims may be brought against the funds that it holds. Thus, the remedy of interpleader is designed to avoid vexation and the fear of double liability. However, while "jurisdiction in interpleader is not dependent upon the merits of the claims of the parties interpleaded, and a plaintiff can maintain the action even though he believes that one of the claims is valid and the other, or others, without merit . . . he must have some real and reasonable fear of exposure to double liability or the vexation of conflicting claims to justify interpleader." *Bierman v. Marcus*, 246 F.2d 200, 202 (3d Cir. 1957); *Travelers Insurance Co. v. Johnson*, 579 F.Supp. 1457 (D.N.J. 1984). NYLife asserts that the instant case meets these requirements.

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conflicting and potentially vexatious claims and/or the threat of

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In response, the Gerasolo defendants assert that "NYLife has made no showing it has any good faith belief it is, or will be, subject to multiple vexation with respect to" the various accounts at issue and, further, that NYLife has failed to demonstrate any real or reasonable fear of double liability or vexation. *Memorandum of Gerasolo Defendants,* at 14. Defendants assert that the sole evidence that there would be any chance of double liability is the "uninformative" Mullenholz letter. *Id.* In addition, the Gerasolo defendants cite New York Banking Law § 518 for the proposition that, as an investment company, NYLife was under no obligation to any adverse claimant (i.e., TAG) until the claimant had obtained a court order restraining the investment company from distributing the funds. Finally, the Gerasolo defendants assert that the severance agreements between the individual defendants and TAG ICIB Services, A.G. are valid and enforceable agreements, thus rendering NYLife's fears unfounded. *Reply Memorandum in Support of Defendants Gerasolo and Bleach Cross-Motions,* at 6.

Even assuming that the defendants' assertions concerning the severance agreements are true, the Gerasolo defendants nonetheless overlook the fact that NYLife faces conflicting claims and the real possibility of vexation; indeed, the submissions of TAG vividly illustrate the fact that NYLife is confronted with genuinely conflicting claims. In addition, TAG has recently filed suit against the Gerasolo defendants in state court, lending further credence to NYLife's claim that it fears vexation or the threat of double liability.

Also, New York Banking Law § 518 — assuming that it is applicable — does not provide an impediment to NYLife's motion for interpleader. To reiterate, interpleader is appropriate where a stakeholder has a reasonable fear of double liability or vexation and eliminates the need for the stakeholder to determine the likely outcome of the underlying dispute.

The Gerasolo defendants may ultimately prevail in their legal dispute with TAG. Nonetheless, it is clear that, absent judgment in interpleader, NYLife faces a real and substantial risk of vexation or double liability. Therefore, NYLife has made the required showing under 28 U.S.C. § 1335.

double liability relating to the dispute concerning the 1989 and 1991 Gerasolo and the 1991 Bleach accounts ;[4] and

it being the opinion of this court that NYLife should be granted judgment in interpleader pursuant to 28 U.S.C. § 1335;[5] and

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4. In addition to their general objections to the interpleader action, the Gerasolo defendants argue vehemently that the "Gerasolo 1989 accounts had nothing whatsoever to do with TAG", and that "TAG does not now, and it never has, asserted any claim to Gerasolo 1989 accounts". *Memorandum of Gerasolo Defendants, at* 9. TAG does, however, assert a claim to those funds. TAG states that .[t]he monies held in the '1989 account' will be necessary to satisfy any judgment awarded to TAG, Inc. for Defendant Gerasolo's tortious conversion of assets and rightfully belongs in a constructive trust for the benefit of TAG, Inc." *Brief in Ooposition to Co-Defendant's Cross-Motion* (hereinafter "*TAG's Brief*"), at 6. Moreover, the Mullenholz letter requested NYLife to freeze "any of the accounts to which" funds allegedly embezzled from TAG had been diverted. Again, whether TAG will ultimately prevail in its claim over these funds is immaterial. Rather, NYLife need only show a real or reasonable fear of vexation or double liability. In addition, an inter-pleading plaintiff must deposit with the Court the highest amount claimed by the defendants." *Nationwide Mut. Ins. Co. v. Eckman,* 555 F.Supp. 775, 778 (D. Del. 1983). Given TAG's claims to these accounts, which TAG alleges were the recipients of embezzled TAG funds, this court cannot hold that NYLife's fear of double liability and particularly of vexation is unreasonable. Accordingly, NYLife's motion for judgment in interpleader is granted regarding the 1989 and 1991 accounts.

5. The Gerasolo defendants argue that even if judgment in interpleader is appropriate here, the defendants should not be enjoined from filing any actions against NYLife based upon NYLife's conduct in seeking relief via interpleader. The Gerasolo defendants base their argument on 28 U.S.C. § 1335, which allows a stakeholder to post a bond with the court in lieu of depositing the funds into the court's registry. Therefore, defendants reason, plaintiff's actions in redeeming and liquidating the various accounts were "unreasonable" in that NYLife could have instead posted a bond, and NYLife may thus be liable for any losses caused by the liquidation. Accordingly, the Gerasolo defendants assert that permanent injunctive relief should be denied.

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it being the opinion of this court that attorneys' fees should be awarded plaintiff ;[6] and

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The premise of defendants' theory, however, cannot be reconciled with the interpleader statute itself and is, not surprisingly, unsupported by any case law. Section 1335 allows a stakeholder to deposit the actual funds with the court's registry or to post a bond to cover that amount. The purpose of the bond requirement is to allow a plaintiff to meet one of the jurisdictional requirements of interpleader when it is not possible to place the actual money into the court's registry. *See* Wright & Miller, *Federal Practice and Procedure*, Civil § 1716. The statute does not obligate a stakeholder to choose one of these remedies over the other depending upon the interests of the underlying claimants, and defendants are unable to cite any authority for that proposition. The statute is designed as a remedy for the stakeholder, and there is not even the slightest suggestion that it gives rise to a cause of action on behalf of a claimant. *See* Wright & Miller, Civil § 1702. For this reason, on the court's own motion the Gerasolo defendants' counterclaim will be dismissed.

Under 28 U.S.C. § 2361, a district court "may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment." Thus, under the plain language of the statute, the court has discretion over whether to convert a temporary injunction barring state court or other federal court actions concerning the fund into a permanent injunction and thereby effectuate the underlying purpose of the interpleader statute. *See, e.g., Shell Pipe Line Corp. v. West Texas Marketing Corp.*, 540 F.Supp. 1155, 1160; Wright & Miller, Civil § 1717. *But see, Algemene Bank v. Soysen Tarim Urunleri Dis Ticaret*, 748 F.Supp. 177, 180 (S.D.N.Y. 1990) ("[Plaintiff] was fully justified in invoking interpleader. Having done so, and having complied with the statutory requirements, "[plaintiff] is now entitled to a discharge and protection against further liability, pursuant to 28 U.S.C. § 2361.") Given the Gerasolo defendants' inability to muster any authority to suggest that NYLife may be held liable based on its placement of the funds with the court as opposed to posting a bond, this court will grant plaintiff's motion for permanent injunctive relief, thereby discharging plaintiff.

6. It is well settled that the award of attorney's fees upon bringing an

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it being the opinion of the court that the request by the

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interpleader action is discretionary. *See* Wright & Miller, Civil § 1719; *Prudential Ins. Co. of America v. Cooper,* 666 F.Supp. 190, 193 (D.Id. 1987). "Typically [attorney's costs and fees] are available only when the party initiating the interpleader is acting as a mere stakeholder, which means that he has admitted liability, has deposited the fund in the court, and has asked to be relieved of further liability." Wright & Miller, Civil § 1719. Upon first blush, then, NYLife appears entitled to an award of attorney's fees.

Both TAG and the Gerasolo defendants suggest, however, that a well-recognized exception to this rule applies to this case. Both argue that a stakeholder may not liberally transfer costs and attorney's fees onto their customers when these costs are incurred in the ordinary course of business. *See Travelers Indemnity Co. v. Israel,* 354 F.2d 488, 490 (2d Cir. 1965). TAG characterizes NYLife's actions as "the type of routine and matter-of-course activity an investment firm such as NYLife should expect to undertake." *TAG's Brief,* at 18. Further, TAG asserts that the simplicity of filing an interpleader action is a factor arguing against awarding attorney's fees.

While it may be true that NYLife faces conflicting claims to investment funds on a regular basis, it most surely does not deal with accusations of employee embezzlement and claims to pension funds for compensation as a "matter-of-course". NYLife was faced with an unusual and urgent set of circumstances and reacted accordingly. Moreover, neither defendant cites any authority for the proposition that attorney's fees are to be denied to interpleading investment firms, let alone those grappling with claims of embezzlement. Finally, the multiple submissions related to NYLife's motion belie the claim that this has been a relatively simple interpleader action.

Accordingly, this court will award reasonable costs and attorney's fees to NYLife in the amount of $5,586.50 as documented in plaintiff's Affidavit of Legal Services and Disbursements. The request by the Gerasolo defendants that this court should fix a date upon which NYLife should show cause why it should not be responsible for the costs and attorney's fees of the Gerasolo defendants is therefore denied.

Appendix A

Gerasolo defendants that TAG be directed to show cause on a date fixed by the court why TAG should not be responsible for the costs and attorney's fees incurred by the Gerasolo defendants in defending this interpleader action must await a determination on the merits of the underlying dispute between TAG and the Gerasolo defendants; and it being the opinion of this court that this court will not prohibit defendant TAG from pursuing its state law claims against the Gerasolo defendants in its separately filed state action nor will it grant TAG leave to do so;[7] and

IT IS on this 19th day of May, 1994,

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7. Defendant TAG requests that this court grant it leave to pursue its claims against the Gerasolo defendants in its previously filed state court action. *TAG's Brief*, at 13. The Gerasolo defendants respond to this request by asserting that this court has supplemental jurisdiction over any cross-claims between the co-defendants and should therefore deny TAG's request. These arguments overlook some very fundamental problems, however. First, this court has been requested by TAG to take action without benefit of a properly filed motion. Second, even if this court would have supplemental jurisdiction over any cross-claims between the codefendants, no cross-claims have been filed with this court relating to the underlying dispute or anything else. Accordingly, this court will neither grant nor deny TAG's request. Finally, it should be noted that "Rule [13(g)] countenances the assertion of cross-claims 'arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.' [citations omitted]. Such cross-claims . . . may be litigated in the course of the interpleader proceeding despite the absence of diversity of citizenship between the particular parties; subject matter jurisdiction is ancillary to that of the interpleader action." James W. Moore, *Moore's Federal Practice*, vol. 3A, § 22.15, p. 22-154; *see also Total Petroleum. Inc. v. Preston Oil Co.*, 1992 WL 71358 (W.D. Mich.). Nevertheless, TAG has elected to pursue its claims in the state court which has jurisdiction over the state law claims, and need not seek permission from this court to pursue such claims in that forum.

Appendix A

ORDERED that plaintiff's motion for a judgment in interpleader in the amount of $215,489.50 is hereby granted; and it is further

ORDERED that plaintiff is hereby dismissed from this action and discharged from any and all further liability for the payment of said deposit into this court's registry; and it is further

ORDERED that defendants The Adherence Group, Inc., Joseph Gerasolo, Elizabeth Gerasolo, Patrick Bleach, Dennis Schnell, Donald Thomas, Richard Hessen, and James Lyons are hereby restrained and enjoined from instituting any other action in this or any other jurisdiction against NYLife Distributors, Inc. or its affiliates based upon NYLife's actions in interpleader action; and it is further bringing this interpleader action; and it is further

ORDERED that plaintiff's motion for costs and attorney's fees in the amount of $5,586.50 is hereby granted; and it is further

ORDERED that defendants Joseph Gerasolo, Elizabeth Gerasolo and Patrick Bleach's cross-motion is denied; and it is further

ORDERED that on the court's own motion, the Gerasolo defendants' counterclaim, which seeks dismissal of the interpleader action and damages as a result of plaintiff's "improper redemption and liquidation" of defendants' accounts for purposes of depositing those monies in court, will be dismissed.

s/ Maryanne Trump Barry

MARYANNE TRUMP BARRY
U.S.D.J.